Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-345

JAMES R. CHISHOLM,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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STATE OF MARYLAND,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

The Petitioner, James R. Chisholm, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Special Appeals of Maryland entered in this proceeding on March 16, 1979.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland was a per curiam opinion, not officially reported, and is contained in Appendix A (*infra*).

JURISDICTION

The opinion of the Court of Special Appeals of Maryland was filed on March 16, 1979. A timely petition to the Court of Appeals of Maryland for a writ of certiorari was denied on June 6, 1979. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) (1964).

QUESTIONS PRESENTED

I

IS THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL VIOLATED WHEN THERE IS JOINT REPRESENTATION OF AN ACCUSED WITH A SHOWING OF PREJUDICE AT A PRETRIAL HEARING DESPITE AN ATTEMPTED PARTIAL WAIVER OF THE CONFLICT BY THE ACCUSED AT THE TRIAL?

II

WHAT NEXUS IS CONSTITUTIONALLY REQUIRED TO SEARCH TWO SEPARATE BUT CONNECTED LOCATIONS UNDER A SEARCH WARRANT THAT ARGUENDO ONLY HAS PROBABLE CAUSE FOR ONE LOCATION?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION AMENDMENT XIV

(N)or shall any State deprive any person of life, liberty or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner, James R. Chisholm, was indicted in November of 1977 in Montgomery County, Maryland and charged with eleven violations of the Controlled Dangerous Substances law of the State of Maryland. Also indicted on similar charges were Marlene R. Matthews, Larry D. Butcher and Steven G. Graham. All four defendants were represented by the same counsel and over petitioner's objection all cases were consolidated for trial. However, only Chisholm and Graham were tried together because Matthews entered into a plea bargain with the State and testified as a prosecution witness at the trial and Butcher failed to appear for the trial,

and when he later appeared he had retained new counsel.

The case came on for a trial by jury on April 3, 1978 before the Honorable Joseph M. Mathias in the Circuit Court for Montgomery County, Maryland. The evidence indicated that in September of 1977 Chisholm attended a party at the home of his friend defendant Graham. Chisholm, who was a police officer for the Metropolitan Police Department, Washington, D. C., was planning to take a vacation trip to Ocean City, Maryland with Graham the following day. At the party Chisholm met for the first time co-defendant Butcher, a visitor from Florida.

At the conclusion of the party, Chisholm because of fatigue and alcohol was unable to drive home so Graham and Butcher arranged for Chisholm to sleep in one of Butcher's rented rooms at the Ramada Inn in Rockville. Chisholm slept in Room 409 of the Ramada Inn where he observed no controlled dangerous substances nor controlled paraphernalia. Butcher slept in the adjoining room 407. The next morning Graham and co-defendant Matthews joined Butcher in Room 407. Chisholm who felt ill remained primarily in Room 409.

The Montgomery County Police had obtained a search warrant to search rooms 407 and 409 of the Ramada Inn in Rockville, and when they executed the warrant, they found Chisholm asleep in Room 409 and co-defendants Matthews, Butcher and Graham in Room 407. In Room 409 the officers discovered substantial quantities of diazepam tablets in locked suitcases and various firearms belonging to Chisholm. In Room 407 the police discovered miscellaneous drug paraphernalia and substantial quantities of cocaine and diazepam. The officers also testified that they discovered a small quantity of diazepam and a small quantity of cocaine in Chisholm's wallet. Chisholm denied that the substances

were in his wallet when it was taken from him at the Ramada Inn.

Chisholm pursuant to the Maryland Rules of Procedure timely filed a pre-trial motion to suppress evidence derived from the search which was heard prior to trial. Before the motion hearing however, both the State's Attorney and Chisholm's trial counsel told the Court that there was a conflict of interest because of joint representation. The Court made no inquiry of Chisholm or Graham or Matthews concerning this problem, and the evidentiary motions were conducted. The motions were denied.

The Trial Court did conduct a brief waiver inquiry of Chisholm and Graham concerning joint representation after the pre-trial motions. The Court never told Chisholm that there was a conflict nor that his former co-defendant Matthews would be a prosecution witness but merely inquired of him whether he wished to waive a potential conflict. The Court made the finding that there was a waiver of independent counsel.

Chisholm was found guilty of five of the eleven counts. Graham was convicted of similar counts. Chisholm was given five years in jail, but Graham was given probation.

After the trial Chisholm dismissed his trial counsel and retained new counsel for appeal.

Chisholm argued in the Court of Special Appeals of Maryland *inter alia* that he was denied his Sixth Amendment right to the effective asistance of counsel because his trial counsel who represented all four defendants in the case had a clear conflict of interest. Chisholm relied upon the decision of this Court in *Holloway v. Arkansas,* 435 U.S. 475 (1978) to support his position. The Court of Special Appeals of Maryland found that Chisholm had waived his right to the effective assistance of counsel and never cited the

Holloway case in its opinion. (Appendix A *infra*)

Chisholm also argued in the Court of Special Appeals of maryland that his Fourth Amendment rights were violated because there was no probable cause to search Room 409 as opposed to Room 407 of the Ramada Inn. The Court of Special Appeals of Maryland without citing a case stated that there was a sufficient nexus between Room 409 and 407 to justify a search. (Appendix A *infra*)

A timely petition for writ of certiorari was filed with the Court of Appeals of Maryland addressing the *Holloway* issue, the search issue and other issues but was denied by that Court on June 6, 1979.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD DECIDE WHETHER THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN THERE IS JOINT REPRESENTATION OF AN ACCUSED WITH A SHOWING OF PREJUDICE AT A PRE-TRIAL HEARING DESPITE AN ATTEMPTED PARTIAL WAIVER OF THE CONFLICT BY THE ACCUSED AT THE TRIAL.

When the Montgomery County Police raised Rooms 407 and 409 of the Ramada Inn in Rockville, Maryland, they seized a quantity of controlled dangerous substances and arrested the four persons found in the two rooms. They were the Petitioner, James R. Chisholm, and co-defendants, Larry

D. Butcher, Steven G. Graham and Marlene R. Matthews. All four were charged with various counts of possessing controlled dangerous substances and all were represented by one lawyer, Sanford Berman.

Butcher did not appear for trial as scheduled and Matthews, after evidentiary hearings on the Motions to suppress evidence but before the trial, entered into a plea bargain agreement with the State and testified as a State's witness at the trial. Chisholm and Graham were tried together over Chisholm's objection.

Prior to the Court's ruling on the Motion to consolidate and prior to the evidentiary hearing on the Motion to suppress, Chisholm's trial counsel told the Court: "[F]rom the point of transfer of guilt I think that would be very harmful to him, Your Honor. It is quite prejudicial to be candid with you . . . So I was keenly aware of the possibility of a conflict situation. . ." (T.Motions, 13,17) The prosecutor went even further than Petitioner's defense counsel and told the court in no uncertain terms that there was a clear conflict of interest and clear prejudice. "It has always been my opinion, and I mentioned this to Mr. Berman there is indeed a conflict of interest where there are four persons charged in an indictment of this nature, where certainly the legal theory of the State's case will be constructive joint possession." (T.Motions, 18-19)

The Court never conducted an inquiry of either Chisholm or Graham, or Matthews concerning this conflict of interest (T.Motions, 23,98) which was pointed out by both the defense counsel and the State's Attorney. The Court never ruled on the conflict issue. (T. Motions, 23,98) The Court ordered the cases to be tried together and conducted a full evidentiary hearing on the Motion to suppress evidence derived from the search.

During the evidentiary phase of the Motion to suppress evidence, Petitioner's counsel inquired of the State's witness as to whether or not any controlled dangerous substances were seized from Graham. Counsel thus opened the door for the State to establish on re-direct examination that some controlled dangerous substances were allegedly found on Chisholm. Chisholm was clearly prejudiced during the evidentiary phase of the Motion to suppress evidence. The Motion to suppress evidence was denied. (T.Motions, 97)

When the case came on for trial the trial court did conduct a waiver inquiry of Chisholm and Graham concerning conflict of interest. (T.A. 1-10) The Court told Chisholm that there was a possibility of a conflict but the Court did not tell Chisholm that there was, in fact, a conflict, nor did the Court explain to Chisholm in detail the manner in which this conflict could manifest itself. Chisholm was not told for example, that his former co-defendant Matthews would now be a State's witness at the trial. There was no affidavit filed by Chisholm, nor was he under oath. There was no narrative articulation by Chisholm of the waiver. There was merely an assent to a series of questions. (T.A. 1-10) The trial court found a waiver of the Sixth Amendment right to the effective assistance of counsel. (T.A. 10)

Matthews testified as a State's witness at trial and Berman did not formally withdraw as her counsel until just before her testimony. Her testimony put Chisholm at the scene and in Room 407, thus creating inferences of constructive possession.

This case presents two issues of constitutional significance which have not been decided by this Court.

The first is, whether or not the per se rule of *Holloway v. Arkansas,* 435 U.S. 475 (1978) applies to pre-trial evidentiary hearings. When both defense counsel and the

prosecution tell the court that there is a conflict of interest and the Court makes no inquiry of the defendants and then conducts an extensive evidentiary hearing on pre-trial Motions, has the accused been denied his Sixth Amendment right to the effective assistance of counsel?

The second issue presented by this case is whether or not the Sixth Amendment Right to the Effective Assistance of Counsel can be waived by an accused and if so what is the waiver standard? This question of waiver was alluded to in *Glasser v. United States,* 315 U.S. 60 (1942) and specifically mentioned but not decided in footnote 5 in *Holloway v. Arkansas, supra.*

It is clear that post-arraignment pre-trial evidentiary hearings are a critical stage of the prosecution to which the Sixth Amendment Right to the effective assistance of counsel attaches. *Coleman v. Alabama,* 399 U.S. 1 (1970). In the instant case the Court was told by both the prosecution and the defense that there was a conflict of interest and the court did not conduct a waiver inquiry of the Petitioner nor otherwise attempt to alleviate the stated conflict prior to the pre-trial evidentiary hearings.

Since both *Glasser v. United States, supra* and *Holloway v. Arkansas, supra,* clearly state that joint representation at trial when a conflict has been raised is a denial of the Sixth Amendment right to the effective assistance of counsel, the question presented by this case is whether the *Glasser-Holloway* rule applies to a *Coleman v. Alabama,* pre-trial critical stage of the prosecution. The recent case of *Gannett Co., Inc. v. De Pasquale,* No. 77-1301 United States Supreme Court (July 2, 1979) would seem to indicate that pre-trial hearings stand in a different posture than trial hearings. This Court should resolve this question.

Both *Glasser v. United States, supra* and *Holloway v.*

Arkansas, supra indicated that the Sixth Amendment right to the effective assistance of counsel can be waived by an accused but neither opinion stated the waiver standard. There was a waiver inquiry of the petitioner in the instant case after the pre-trial hearings but before the trial.

Different constitutional rights have different waiver standards. *Johnson v. Zerbst,* 304 U.S. 458 (1938) and *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). Petitioner submits that the waiver inquiry in this case fell short of the *Johnson v. Zerbst, supra* standard of a knowing and intelligent waiver of a known right which guarantees a fair trial.

Indeed, lower federal courts have considered putting defendants under oath and having them file affidavits and having a narrative articulation of the waiver. *See United States v. Lawriw,* 568 F.2d 98 (8th Cir. 1977); *United States v. Kutas,* 542 F.2d 527 (9th Cir. 1976); *United States v. DeBerry,* 487 F.2d 448 (2nd Cir. 1973). This was not done in the instant case, Petitioner merely assented to a series of questions.

This court should issue a writ of certiorari in this case to decide if the Sixth Amendment right to the effective assistance of counsel in joint representation cases attaches to pre-trial hearings and to decide what waiver standard applies to the Sixth Amendment right to the effective assistance of counsel.

II

THIS COURT SHOULD DECIDE WHAT NEXUS IS CONSTITUTIONALLY REQUIRED TO SEARCH TWO SEPARATE BUT CONNECTED LOCATIONS UNDER A SEARCH WARRANT THAT ARGUENDO ONLY HAS PROBABLE CAUSE FOR ONE LOCATION.

The Montgomery County police executed a dual search at the Ramada Inn in Rockville, Maryland. One search team entered Room 407 and a second search team entered Room 409. The officers were armed with one search warrant which authorized the search of both rooms.

Chisholm pursuant to the Maryland Rules of Procedure timely filed Motion to suppress evidence derived from the search (R.15) Chisholm argued below that because of a breakdown of the controls in the so-called "controlled buy" which occurred in Room 407 there was insufficient probable cause for the issuance of a search warrant. Chisholm also argued that notwithstanding the sufficiency or non-sufficiency of probable cause for Room 407 there was clearly insufficient probable cause to authorize the search of Room 409.

The Court of Special Appeals of Maryland relying on the State Court case of *Hignut v. State,* 17 Md. App. 399, 303 A.2d 173 (1973) ruled that absolute controls on a so-called "controlled buy" are not required. The court also ruled, without citing a single case, that despite the fact that the so-called "controlled buy" occurred in Room 407 and not in Room 409 that there was a sufficient nexus between the two rooms to justify a search of Room 409 as well as Room 407.

The questions presented by this case are:

First, when an affidavit in support of a search warrant relies upon a so-called "controlled buy" and not upon the reliability, credibility and basis of knowledge of a confidential informant what controls are constitutionally mandated in order to preserve the probable cause of the so-called "controlled buy"?

Second, what nexus is constitutionally mandated to authorize the search of a separate but connected location when there is arguably only probable cause for the search of the primary location?

When evaluating the probable cause in a search warrant, the reliability, credibility and basis of knowledge of the confidential informant must be clearly established, *Aguilar v. Texas,* 378 U.S. 108 (1964) or else there must be self-verifying details which supply the probable cause. *Spinnelli v. United States,* 393 U.S. 410 (1969). In the instant case the State did not rely upon the *Aguilar-Spinnelli* test for establishing the probasble cause in this case, rather it focused upon the so-called "controlled buy" for fulfilling the *Aguilar - Spinnelli* test. However, the record indicates that some of the controls in the so-called "controlled buy" broke down.

The affidavit indicates that an informant was strip-searched during a twenty-five (25) hour period preceeding the so-called "controlled buy" and does not indicate where the strip-search occurred. The affidavit further does not say that the informant was constantly in sight of the police officers after the strip-search nor whether or not there were any other entrances or exits to Room 407. In short, there were very few controls in the so-called "controlled buy". Also, there was a misrepresentation in the affidavit concerning the so-called "controlled buy". The affidavit recited that after leaving room 407 "the informant came directly to

your affiants." However, the testimony of the officers at trial was that the informant did not come directly to the affiants but rather walked in the opposite direction down a flight of stairs and was out of sight of the affiants for a short period of time. This was a material misrepresentation and/or a false statement in the affidavit as prohibited by this Court in *Franks v. Delaware,* 438 U.S. 154 (1978).

The affidavit in support of the search warrant (with one minor exception) applied only to Room 407. The so-called "controlled buy" related solely to Room 407, the confidential informant entered and exited only Room 407, the affidavit never recites that the informant ever entered Room 409, nor was there any indication that the informant ever observed any controlled dangerous substances in Room 409. The affidavit is also silent as the physical relationship of Rooms 407 and Room 409. The issuing magistrate had no way of knowing whether or not the rooms were separated by a hallway or around the corner from one another or were connected in any way.

The only nexus between Room 407 and Room 409 was the fact that they were allegedly leased by someone with a last name of "Gee". The confidential informant told the police that it was a Larry Gee who registered in Rooms 407 and 409, but the affidavit recites that the Innkeeper at the Ramada Inn reported that Rooms 407 and 409 were registered to a Marshall Gee. That is the only connection between Room 407 and Room 409.

The law on the subject of what nexus is required in joint searches is rather slim. The recent case of *United States v. Dorsey,* 591 F.2d 922 (D.C. Cir. 1979) states: "Federal Courts have long held that police officers, before they constitutionally may search a separate residential unit within an apartment building, must have probable cause to do so

that is specifically related to that unit." *See* also, *People v. Hensen*, 38 N.Y.2nd 17, 339 N.E.2d 837 (1975).

Thus, this Court should issue a Writ of Certiorari in this case to decide the questions of what controls are required in an affidavit for a search warrant when the affidavit does not rely on the *Aguilar-Spinnelli* test of reliability, but rather on a so-called "controlled buy" and to decide the related question of what nexus is constitutionally required when a search warrant authorizes the search of two separate but related locations and there is arguendo only probable cause for the primary location.

CONCLUSION

For the reasons heretofore cited and in reliance upon legal authorities hereinabove set forth, it is respectfully submitted that a writ of certiorari to the Court of Special Appeals of Maryland be issued herein.

Respectfully submitted,

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APPENDIX A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 1978

No. 818

JAMES RAYMOND CHISHOLM

v.

STATE OF MARYLAND

Thompson
Wilner
Couch,
JJ.

PER CURIAM

Filed: March 16, 1979

James Raymond Chisholm, the appellant, was convicted in a jury trial, in the Circuit Court for Montgomery County, of two counts of possession of cocaine, two counts of possession of diazepam, and one count of possession of controlled paraphernalia. Appellant was sentenced to a total of five years incarceration. From these convictions, appellant appeals.

Appellant presents nine issues to this Court for consideration, which we shall discuss in turn. Because of the nature of these issues, we shall supply the pertinent factual background for each issue as we discuss it, and will now present only a brief background of the events giving rise to this appeal.

On September 22, 1977, Montgomery County police officers, armed with a search and seizure warrant, began a search of Rooms 407 and 409 of the Ramada Inn in Rockville, Maryland. At the time of the execution of the warrant appellant was found alone in Room 409 and three codefendants, Matthews, Graham, and Butcher, were in Room 407. According to the police, a connecting door between the rooms was open. During the course of the search certain proscribed controlled dangerous substances and paraphernalia, as well as three handguns, were found in the rooms. A subsequent search of appellant's wallet revealed a small quanity of cocaine and three diazepam tablets.

Appellant and his codefendants were arrested and, ultimately, separately indicted. All of the defendants engaged the same attorney, not present appellate counsel. The State filed a motion to consolidate the respective indictments for trial, and the appellant moved to dismiss the indictment, to suppress evidence, and demanded particulars. After a hearing, the trial court granted the State's motion to consolidate and denied appellant's motions to dismiss and suppress.

Thereafter, the case proceeded to trial as to appellant and Graham - Matthews turned State's witness and was not tried, and Butcher was not present for either the motions hearing or trial.

I

Appellant's first claim is that he was denied his Sixth Amendment right to the effective assistance of counsel because all four defendants were represented by the same attorney. The record shows that initially all of the defendants were represented by the same attorney. Matthews apparently negotiated a plea and testified for the State, and was then represented by different counsel. The record also demonstrates that at the pre-trial hearing on the motions, the trial court, sua sponte, raised the question of joint representation. Appellant and Graham were present, and neither made any objection or expressed any concern as to the possible ramifications of joint representation. The judge made no definitive ruling on the problem. When the case came on for trial, the judge (not the same judge who heard the motions) raised the question and conducted a hearing. Appellant's counsel and the Assistant State's Attorney both advised the court that there could be a conflict. The trial judge then engaged in a substantial colloquy with appellant and his codefendant, during which it was developed that both were college educated, neither one suffered from a mental or physical impairment, and both were employed. Their responses to the judge's questions showed they clearly understood that there was a possibility of a conflict but, nevertheless, they desired to have the same attorney represent them. This was ultimately allowed.

Appellant now claims there was an invalid waiver of his right to the effective assistance of counsel. He says that even

if it was a valid waiver, he was sufficiently prejudiced so as to warrant a new trial. The State argues that the waiver was valid and, in any event, that no prejudice was suffered by appellant. The State also contends that this issue cannot be raised on direct appeal since it was not raised below. Md. Rule 1085. While this latter argument may have some merit, we think it is necessary to address the issue so that any possibility of manifest injustice may be avoided. *See Rose v. State,* 37 Md. App. 395, 377 A.2d 597 (1977).

If anything can be agreed upon by all concerned, it is that any defendant is entitled to the effective assistance of counsel of his own choosing, if retained and not appointed. *English v. State,* 8 Md. App. 330, 259 A.2d 822 (1969). The precise problem confronting the court in this case is how far this principle extends. Here, the defendant retained his own attorney knowing that his codefendants had retained the same attorney. The attorney and the court made him aware that joint representation could raise conflicts of adequate representation. The defendant, though obviously intelligent, declared that he wanted to be so represented. After conviction, he now asks for a new trial, claiming he was prejudiced by the dual representation.

We can afford no relief because we believe appellant has effectively waived his right to complain. The Sixth Amendment right to effective assistance of counsel, like any other right guaranteed by either the United States Constitution or that of this State, may be waived, providing such waiver is voluntary and intelligent. *See generally State v. Renshaw,* 276 Md. 259, 347 A.2d 219 (1975). Our review of the record persuades us that the trial judge covered the matter thoroughly with appellant, and that appellant made his choice freely.

Appellant argues alternatively that even if there were a valid waiver, if he was prejudiced by the joint representation

he is entitled to a new trial, citing *United States v. Kutas,* 542 F.2d 527 (9th Cir. 1976), *cert. den.,* 429 U.S. 1073, and *United States v. DeBerry,* 487 F.2d 448 (2nd Cir. 1973), to support this contention. Our review of these cases indicates appellant misread them. In *Kutas,* the Court said, in part:

> "Additionally, even were Kutas able to point to some prejudice, nevertheless her affidavit satisfies the burden of demonstrating that she knowingly and voluntarily waived her right to separate counsel." 542 F.2d at 530.

In *DeBerry,* there simply had not been any significant waiver inquiry by the court. In remanding the case, the Court stated:

> ". . . it is in the best interests of justice, we think, to reverse and remand for a new trial as to both parties after the court has acertained that each either has separate counsel or that, *from the beginning,* each understands clearly the possibilities of a conflict of interest and waives any rights in connection with it." 487 F.2d at 454.

Other federal appellate circuits have considered this problem and have concluded that while it is the affirmative duty of the trial court to inquire as to whether there is a conflict of interest which renders the assistance of counsel ineffective, it is also clear that a defendant may waive his Sixth Amendment right. *See United States v. Lawriw,* 568 F.2d 98, 103-4 (8th Cir. 1977), and cases cited therein.

Appellant also relies on *State v. Hunt,* 26 Md. App. 417, 338 A.2d 95, *cert. den.,* 276 Md. 745 (1975); *Kent v. State,* 11 Md. App. 293, 273 A.2d 819 (1971); and *Brown v. State,* 10 Md. App. 215, 269 A.2d 96 (1970). Our reading of the cases leads us to conclude they offer no support to appellant because none of them deal with the issue of waiver.

We hold that appellant voluntarily and knowingly waived his right to effective assistance of counsel, and his belated effort to show prejudice avails him nothing in this appeal.

Appellant's next argument is that the trial court erred in granting the State's motion to consolidate his case for trial with that of his codefendant Graham. The basis for his objection appears to be limited to the fact that he and Graham were represented by the same attorney and that there was a conflict of interest between Graham and himself.

Maryland Rule 745 a permits the consolidating for trial of two or more charging documents if the offenses and the defendants could have been joined in a single charging document. Rule 745 c allows the court to order separate trials of counts, charging documents, and defendants, if it appears that any party will be prejudiced by a joint trial. We have held that whether separate trials should be ordered rests within the sound discretion of the trial court. *See McKnight v. State,* 33 Md. App. 280, 364 A.2d 116 (1976), *rev'd.,* 280 Md. 604, 375 A.2d 551 (1977) (held that trial court abused its discretion); *Jones v. State,* 38 Md. App. 432, 381 A.2d 317 (1978), *aff'd,* ____ Md. ____ (No. 7, Sept. Term, 1978, filed January 4, 1979). Appellant does not say that he could not have been charged with his codefendant in a single indictment. Rather, he again sets forth the conflict of interest argument addressed above. The record is clear that the trial court granted the motion to consolidate the indictments before there was argument and a ruling on the effective assistance of counsel issue. Nevertheless, we find no error since we believe there was an effective waiver of the right to a separate trial inasmuch as the very ground for this issue was the same as that advanced in the Sixth Amendment argument. *See generally, Sears v. State,* 9 Md. App. 375, 264 A.2d 485 (1970), *cert. den.,* 258 Md. 730. Having so concluded, we find no error in consolidating the cases for trial.

Appellant further argues that the trial court erred in

admitting evidence from a search based on a warrant that lacked probable cause for its issuance. We disagree.

Before discussing why we disagree with appellant, perhaps it is best to again set forth the well established principles that guide us in determining the validity of search warrants generally. In *United States v. Ventresca,* 380 U.S. 102, 85 S. Ct. 741, 13 L.Ed.2d 684 (1965), the Supreme Court said:

> "If the teaching of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion." 380 U.S. at 108.

We are instructed further by the same case that a warrant should not be invalidated by interpreting the affidavit in a hypertechnical manner. In *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964), the Supreme Court pointed out that the preference for warrants is so marked, that less persuasive evidence will justify the issuance of a warrant than would justify a warrantless search or warrantless arrest. *See also Hignut v. State,* 17 Md. App. 399, 303 A.2d 173 (1973). It also appears settled tha a "controlled buy" will, in and of itself, supply sufficient probable cause to justify the issuance of a search warrant. *Hignut v. State, supra; Vines v. State,* 40 Md. App. 658, 394 A.2d 809 (1978).

With the above in mind, we now turn to the affidavit upon which the search warrant involved in this case was issued. Because of its short length we set forth the recitation of supporting data as contained in the affidavit:

> "1. Your affiants interviewed a confidential informant who related that there was a subject by the name of Larry Gee registered in Room 407 and Room 409 at the Ramada Inn in Rockville, Maryland. The confidential informant described Gee as a white male,

over six feet, blonde hair, in his early thirties. The confidential informant further related that Gee was registered in Room 407 and Room 409 for the purpose of selling cocaine and quaaludes. Cocaine and Quaaludes are Controlled Dangerous Substances.

2. On September 22, 1977, Mary Dailey, was interviewed by Cpl. J. Fajardo, Montgomery County Department of Police, assigned to the Vice-Narcotic Division. Mary Dailey is the Secretary to the Innkeeper of the Ramada Inn located at 1251 West Montgomery Avenue, Rockville, Montgomery County, Maryland. Mary Dailey related that Room 407 and Room 409 are registered to Marshall Gee and an unknown white female and an unknown white male. Marshall Gee checked into the Ramada Inn on Monday, September 21, 1977 and has a checkout time of Saturday, September 24, 1977. Marshall Gee listed his home address as 1320 Potter Drive, Springs, Colorado. Marshall Gee also listed his means of transportation as a Ford LTD, bearing Florida registration 782659U.

3. Between 12 noon on September 21, 1977 and 1:00 P.M. on September 22, 1977 your affiants met with the confidential informant at which time your affiant completely strip searched the confidential informant and found him and his clothing to be completely free of any controlled dangerous substances. Your affiants then took the confidential informant to the Ramada Inn, 1251 West Montgomery Avenue, Rockville, Montgomery County, Maryland for the purpose of obtaining samples of controlled dangerous substances. Your affiant watched the confidential informant enter Room 407 of the aforementioned Ramada Inn and exit Room 407 of the aforementioned Ramada Inn. The confidential informant left Room 407 and came directly to your affiants at which time he turned over to your affiant, Off. J. R. Hock, Jr., samples of suspected controlled dangerous substances. The confidential informant related to your affiants that he had observed large quantities of what he thought to be cocaine and quaaludes.

4. On September 22, 1977, your affiants transported the suspected controlled dangerous substances to the Montgomery County Police Crime Laboratory where it was analyzed by Forensic Chemist Richard Gervasoni and found to be in fact cocaine and quaaludes."

Appellant contends that the affidavit was defective because the two-pronged test of reliability-credibility with basis of knowledge, as set out in *Aquilar, supra,* was not established, and also because, in effect, there was no "controlled buy". The State argues that the dictates of *Aguilar and Spinnelli v. United States,* 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969) have been met and that there was a valid "controlled buy". From the view we take of this issue, we need not discuss the *Aguilarian* prongs of reliability-credibility and basis of knowledge. We say so because we believe there was a valid "controlled buy" which, in and of itself, supplied the necessary probable cause for the issuance of the warrant. *Hignut v. State, supra; Vines v. State, supra.* Appellant argues that the affidavit does not show a "controlled buy" because the affidavit does not show when the confidential informant was strip searched in relation to when he went into the room at the Ramada Inn; the affidavit does not show if the surveillance of Room 407 was unbroken after the informant entered; there was no showing that no one else thereafter entered the room; there was no evidence that 407 did not have another door to the outside; there was no showing from whom the informant obtained the controlled dangerous substance, nor whether it was from Room 407 or 409, assuming that the rooms were interconnected. Finally, appellant argues that the affidavit recited

that the informant came directly to the affiants after exiting the room, whereas at trial one of the officers stated he was downstairs using a phone and the other testified that actually the informant, upon exiting the room, went down the hall in the opposite direction and went down a flight of stairs, where the officer caught up with the informant on the floor below, having used a diffferent set of stairs. We find none of these reasons sufficient, singularly or collectively, to demonstrate there was an invalid "controlled buy", when the affidavit is viewed in a common sense manner and not hypertechnically. Even if one were to accept the version of the "controlled buy" given at the trial, it is evident that the "buy" was completed and the informant approached by the officer within a matter of seconds. Contrary to appellant's view of the facts, it is apparent that at least one of the officers maintained an unbroken surveillance of the room while the "buy" took place. Moreover, we do not accept appellant's theory that the versions given in the affidavit and at trial are necessarily inconsistent. For the controlled buy to be consummated without alerting the subject of the surveillance, it is understandable that the officer and the informant met "directly" at a place in close proximity where the informant could relate his observations and turn over the samples, unnoticed by appellant. We have carefully reviewed the affidavit and conclude that it adequately demonstrted, from the affiant's own personal observation of the controlled buy, sufficient probable cause to believe that Rooms 407 and 409 of the Ramada Inn contained proscribed controlled dangerous substances. The issuance of the warrant was proper and there was no error on the part of the trial court in admitting the evidence.

4

Appellant also contends the trial court was in error in admitting evidence seized in Room 409 because there was no probable cause to search that room. We find no merit in this contention. First, it must be observed that the actual search of Room 409 was done under the authority of a duly issued warrant. Thus to agree with appellant we would have to conclude that the warrant was invalid as to that room. Again, reading the affidavit in a common sense manner, we conclude it adequately demonstrated probable cause to believe Room 409 contained controlled dangerous substances. It was stated that both rooms were registered to one "Gee", although the first names were different. We believe a fair inference could be drawn, from the numerical sequence, that the rooms were connected. The informant had stated that both rooms were rented for the purpose of selling drugs. We believe common sense will justify a belief that both rooms were so used.

5

Appellant next argues that, since the affidavit used to support the search warrant contained a statement which was either knowingly false or in reckless disregard of the truth, the trial court erred in not conducting an inquiry to determine if this was the case and, if so, setting the false statements aside, whether the remaining content was sufficient to establish probable cause. *See Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674 (1978). He argues on appeal that there was a false statement in the affidavit insofar as it related that the confidential informant, upon leaving Room 407, came directly to the affiants, whereas it was revealed at trial that

the informant left the room, went down the hall in the opposite direction from one of the affiants, down a stairwell to the floor below, where he was met by one of the officers. We need not reach the question of the retroactivity of *Franks,* as raised by the State, because we hold that this issue was not raised below. Md. Rule 1085. Our reading of the record persuades us that appellant raised the issue of the statement in the affidavit only in reference to the presence of quaalude pills, which turned out to be valium. No proffer was made below that there was a false statement in relation to the "controlled buy". Mr. Justice Blackmum, speaking for the Court in *Franks, supra,* stated:

> ". . . where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 2677.

We do not believe this issue has been preserved for appeal. Nevertheless, assuming the issue was preserved, we conclude there is not merit to appellant's argument because, even setting aside the allegedly false statement as to how the informant went from the fourth to the third floor, the remainder of the affidavit furnished probable cause.

6

Appellant was convicted of possession of cocaine found in one of the Inn's rooms, possession of diazepam, likewise found, and of controlled paraphernalia. He now argues that his motion for judgment of acquittal as to these counts should have been granted because the evidence was insufficient to demonstrate constructive possession. It is argued by appellant, and the record confirms, that the matters covered in these counts two, four, and eight were seized from Room 407 but that he was arrested in Room 409. He further contends that there was no evidence he had rented Room 407 or had any interest in or control over that room, or had any knowledge of its hidden contents. Nevertheless, there was evidence that he was in Room 407 at one time. Appellant attempts to counter the evidence of his presence in the room with the argument that there was no evidence the proscribed drugs and paraphernalia were then visible. In *Cain v. State,* 34 Md. App. 446, 367 A.2d 47 (1977), *cert. den.,* 280 Md. 728, Judge Liss, speaking for this Court, said:

> "It is well settled that possession of narcotic drugs under the Maryland law need not be sole possession; there may be joint possession and joint control in several persons. The duration of possession and the quantity possessed are not material, nor is it necessary to prove ownership in the sense of title. *Folk v. State,* 11 Md. App. 508, 275 A.2d 184 (1971).
>
> Judge Moylan in *Folk,* made an excellent, exhaustive survey of the numerous cases that we have had before us in which the sufficiency of the evidence to prove joint possession was in issue. After reviewing the factual situation in each of the cases cited in *Folk,* Judge Moylan found the common thread running through all the cases negating joint possession to be: (1) the lack of

proximity between the defendant and the contraband, (2) the fact that the contraband was secreted away in hidden places not shown to be within his gaze or knowledge or in any way under his control, and (3) the lack of evidence from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use of the contraband. *See, Haley, Peterson and Roberts v. State,* 7 Md. App. 18, 253 A.2d 424 (1969); *Wimberly v. State,* 7 Md. App. 302, 254 A.2d 711 (1969); *Scott v. State,* 7 Md. App. 505, 256 A.2d 384; and *Barksdale v. State,* 15 Md. App. 469, 291 A.2d 495 (1972)." *Id.* at 449.

The evidence in this case, when viewed in a light most favorable to the State, persuades us that there was no error in denying appellant's motion for judgment of acquittal. There certainly was evidence to show close proximity between appellant and the contraband in Room 407; it was there and so was he. While some of the contraband may have been in a briefcase and some in a dresser drawer, there was some testimony that both were open. Further, there was testimony that, in plain sight, there was a cutting board, razor, white powder, and a sraw, all typical implements used for "snorting" cocaine. In addition, there was testimony from Matthews that appellant was alone in Room 409 when the raid occurred and that she heard a voice from that room say, "We have been popped". We believe the evidence was sufficient to at least raise a rational inference, if not to show directly, that appellant was in constructive possession of the proscribed drugs and implements found in Room 407 so as to justify submission of the issue to the jury.

7

Appellant was convicted of two counts of possession of cocaine and two counts of possession of diazepam. The

record shows that there were separate counts for possession of the controlled dangerous substances found on appellant's person and for those substances found in Rooms 407 and 409. Thus he was charged in Count 2 with possession (constructive) of cocaine found in Room 407, and in Count 3 with possession (actual) of cocaine found on his person. He was charged in Count 5 with possession (constructive) of diazepam found in the rooms, and in Count 6 with possession (actual) of diazepam found on his person.

Appellant argues, and we agree, that there should have been a merger of the counts which involved possession of the same drugs, *i.e.,* Counts 2 and 3 and Counts 5 and 6. The State contends that there should be no merger because each of the counts constitutes a separate offense. We follow the test for determining the identity of offenses as laid down in *Newton v. State,* 280 Md. 260, 373 A.2d 626 (1977):

"Thus, under both federal double jeopardy principles and Maryland merger law, the test for determining the identity of offenses is the required evidence test. If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited." *Id.* at 268.

See Brooks v. State, ____ Md. ____, ____ A.2d ____ (1979) (No. 4, Sept. Term, 1978, filed 2/16/79).

Counts 2, 3, 4 and 5 each charge appellant with possession of cocaine (2 and 3) and diazepam (4 and 5), in violation of Art. 27, §287(a), which provides:

"Except as authorized by this subheading, it is unlawful for any person:

(a) to possess or administer to another any controlled dangerous substance, unless such substance was ob-

tained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice."

In examining this statute, and the respective counts, it is obvious that Counts 2 and 3 and 5 and 6 are not separate offenses as neither Count 2 or 3 or 5 or 6 requires proof of a fact which the other does not. Upon conviction of all these counts, the court should have merged Counts 2 and 3 and rendered one sentence, and merged Counts 5 and 6 and rendered one sentence. We are not unmindful that the trial court, by giving concurrent sentences, may have accomplished a merger. Nevertheless, under the teachings of *Newton, supra,* we may not allow these convictions to stand. In *Newton,* Judge Eldridge stated:

"In the instant case, there has been but one prosecution and trial for the felony murder and the underlying felony so that no issue concerning successive trials for the same offense is presented. *Cf. Bynum v. State,* 277 Md. 703, 707-708, 357 A.2d 339, cert. denied, 429 U.S. 899, 97 S. Ct. 264, 50 L.Ed.2d 183 (1976). However, both parties and the Court of Special Appeals have proceeded on the assumption that if both offenses are deemed the same under double jeopardy principles, so that both offenses merge upon conviction, separate sentences on both would constitute double punishment and the judgment of conviction and sentence on the lesser offense must be vacated. Even though the sentences on the felony murder conviction and the underlying felony of attempted robbery are concurrent, this assumption is valid in view of our prior Maryland cases in which the Court has reviewed the validity of all convictions and sentences challenged even though concurrent. *Stewart v. Warden,* 243 Md. 697, 699-700, 221 A.2d 709 (1966); *Crowe and Williston v. State,* 240 Md. 144, 146, 152-153, 213 A.2d 558 (1965). *See* the discussion of this question in *Benton v. Maryland, supra,* 395 U.S. at 787-793; *see also United States v. Belt,* 516 F.2d 873, 875 n. 7, 876 (8th Cir. 1975)." *Id.* at 265.

Accordingly, we shall vacate the sentences and convictions given in Counts 3 and 6.

8, 9, and cross-appellant's question

Appellant's questions 8 and 9 and cross-appellant's single question stem from actions taken after the trial in this case. The appellant was charged in Count 1 with possession of cocaine with intent to distribute (Art. 27, §286(a)(1); in Count 4 with possession of diazepam with intent to distribute (Art. 27, §286(a)(1); in Count 10 with use of a handgun in the commission of a felony (Art. 27, §36B); and in Count 11 with keeping and maintaining a common nuisance (Art. 27, §286(a)(5). The jury was unable to reach a verdict on these counts and, with the consent of appellant, the court declared a mistrial as to them. Subsequent thereto, appellant moved to dismiss these counts on double jeopardy grounds. After a hearing on this motion the trial court granted appellant's motion as to Counts 1 and 4, but denied it as to Counts 10 and 11. Thereafter, appellant appealed this ruling separately and the State filed a cross appeal as to the court's action in dismissing Counts 1 and 4.

We shall deal first with Count 11 (common nuisance) since this is appellant's question 8. As indicated above, appellant's motion as to all counts was bottomed solely on grounds of double jeopardy. As to Count 11 he argued below, and reiterates here, that since the trial court erred in not granting his motion for judgment of acquittal as to this count, he cannot be retired on Count 11 on double jeopardy grounds. The trial judge, in ruling on his motion, stated:

> "While we are inclined to agree with the defendant's contention that the Court erred in declining to grant the motion for judgment of acquittal, we do not think that we have the power at this time to dismiss Count 11 on the ground of double jeopardy. However, we do not think the count ought to be retried."

The appellant challenged the ruling, stating that the count should have been dismissed on the basis of collateral estoppel, citing *Ashe v. Swenson,* 397 U.S. 436 (1970); *Simpson v. Florida,* 403 U.S. 384 (1970); and *Sealfon v. United States,* 322 U.S. 575 (1948), as authority. Our review of these cases persuades us that appellant's reliance thereon is misplaced. We note that these cases are inapposite in that they all concern situations where there had been a previous final judgment of acquittal. There is no final judgment here to trigger the operation of the double jeopardy concept, only a mistrial to which appellant consented, coupled with a remark by the trial judge that he may have erred in not granting a motion for judgment of acquittal. We find no error here.

Turning next to Count 10, use of a handgun in the commission of a felony, appellant argues that the trial court should have dismissed this count since it granted appellant's motion to dismiss as to Counts 1 and 4, which he alleges were the felony counts. Thus, the appellant contends that his motion to dismiss as to the handgun count should have been granted. We agree with the appellant but for slightly different reasons.

The trial court kept the handgun count viable by denying appellant's motion to dismiss as to Count 11, the common nuisance count, which provided the underlying felony. Nevertheless, we believe this count should have been dismissed as we do not believe the statute was designed or

intended to cover the situation involved here. The statute specifically requires a finding of "use" in the commission of a crime of violence or a felony. There is a complete lack of any evidence to show a use of a handgun, only that guns were present. *Couplin v. State,* 37 Md. App. 567, 577, 378 A.2d 197 (1977). Accordingly, the State failed to prove the elements necessary for a conviction under Art. 27, §36B(d), insofar as it did not produce any evidence that a handgun was used in the perpetration of a felony or crime of violence.

This leaves for resolution the State's cross appeal wherein the State contends the trial court erred in dismissing Counts 1 and 4 on double jeopardy grounds after the jury had failed to reach a verdict on these counts and a mistrial, with the consent of the State and appellant, was declared by the court. The trial court, in granting appellant's motion on Counts 1 and 4, stated:

> "We are of the opinion that the defendant's motion to dismiss Counts 1 and 4 should be granted and that his motion to dismiss Counts 10 and 11 should be denied. As to Counts 1 and 4, the controlling case is *Newton v. State,* 280 Md. 260. There at page 266 the Court said:
>
> > 'Where only one offense requires proof of an additional fact so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes.'
>
> The defendant was convicted by the jury on Count 2, charging simple possession of cocaine found in room 407 at the Ramada Inn. Count 1 on which the jury was unable to agree charges the defendant with possession of the same cocaine but in sufficient quantity to indicate an intent to distribute same. Under the definition above, therefore, the offenses charged in Counts 1 and 2 are deemed to be the same for double jeopardy purposes.

The jury found the defendant guilty of Count 5

charging possession of diazepam found in room 407 at the Ramada Inn. Count 4 charges the defendant with possession of the same diazepam but in sufficient quantity to indicate an intent to distribute. For the same reason, therefore, double jeopardy precludes the defendant from being tried again on Count 4."

We agree with the trial judge in his assessment of the double jeopardy issue presented by appellant. This conclusion is in accord with the recent Supreme Court decision in *Brown v. Ohio,* 432 U.S. 161, 97 S. Ct. 2221 (1977). In *Brown,* the Court held that where the only distinction between two statutory offenses was an element of intent, then the offenses constitute the "same offense" for double jeopardy purposes. 97 S. Ct. at 2226. The only distinction present in this case between Counts 1 and 2, and Counts 4 and 5, is a sufficient quantity of cocaine and diazepam from which an intent to distribute could be inferred. Accordingly, we find no error in this regard.

JUDGMENTS ON COUNTS 3 AND 6 VACATED; ALL OTHER JUDGMENTS AFFIRMED.
ORDER GRANTING MOTION TO DISMISS
COUNTS 1 AND 4 AFFIRMED.
ORDER DENYING MOTION TO DISMISS COUNT 10 REVERSED.
ORDER DENYING MOTION TO DISMISS COUNT 11 AFFIRMED.

COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY MONTGOMERY COUNTY.

APPENDIX B

JAMES RAYMOND CHISHOLM	In the Court of Appeals of Maryland
v.	**Petition Docket No. 80 September Term, 1979**
STATE OF MARYLAND	(No. 818, September Term, 1978 Court of Special Appeals)

ORDER

Upon consideration of the petition and cross petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and cross petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: June 6, 1979